

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Communications Assistance for Law Enforcement)	ET Docket No. 04-295
Act and Broadband Access and Services)	RM-10865

**JOINT COMMENTS OF THE

CENTER FOR DEMOCRACY & TECHNOLOGY,
ELECTRONIC FRONTIER FOUNDATION, AND PULVER.COM

TO THE FURTHER NOTICE OF PROPOSED RULEMAKING**

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Dated: November 14, 2005

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The Center for Democracy & Technology, the Electronic Frontier Foundation, and pulver.com respectfully submits these Comments on the Further Notice of Proposed Rulemaking (“Further NPRM”) released by the Commission on September 23, 2005.

As the Commission is aware, we believe that the Commission lacks the statutory authority to extend CALEA as it did in its First Report and Order (“First R&O”) in this proceeding. We and others are pursuing those arguments in court. As briefly discussed below, the questions raised in the Further NPRM make even more clear the problems inherent in the First Report and Order.

The Further NPRM first asks whether there are any other types of VoIP services that should be covered by CALEA beyond the “interconnected VoIP” providers addressed in the First R&O. *See* Further NPRM ¶ 48. In the First Report and Order, the Commission imposed CALEA obligations on “interconnected” VoIP providers, which for the most part are providers

that are attempting to emulate the Public Switched Telephone Network (“PSTN”). Although we do not believe – statutory authority aside – that there was sufficient factual foundation presented by law enforcement for extension of CALEA to interconnected VoIP, there exists absolutely zero record evidence to suggest that any provider of non-interconnected VoIP is in any way a “substantial replacement” for local telephone service. Moreover, law enforcement has not presented any evidence of any problem to be solved with regard to non-interconnected VoIP (or any VoIP for that matter). Thus, for many of the reason advanced in the first stage of this rulemaking proceeding, the Commission lacks not only the statutory authority but also the factual foundation on which to extend CALEA to non-interconnected VoIP service providers.

The Further NPRM’s second question – seeking comment on “the appropriateness of requiring less than full CALEA compliance for certain classes or categories of providers,” *see* Further NPRM ¶ 49 – highlights a central failing of the First Report and Order. In the First R&O, the Commission utterly failed to define what “full” CALEA compliance means in the broadband or VoIP contexts. How can the Commission consider whether it can require less than “full compliance” when it has not even determined what “full compliance” is in the first place? For example, the Commission has already acknowledged that differently situated broadband and VoIP service providers would be required to deliver to law enforcement different information depending on where they were in the decentralized architecture of the Internet. *See* First R&O ¶ 44. But these differently situated entities would still be in *full* compliance, not partial compliance. So far, unfortunately, the Commission has failed to declare what various providers’ CALEA obligations would be. Until the Commission defines what full compliance is, taking into account the multitude of kinds of entities and the various service configurations, it cannot even begin to consider what less than full compliance would be. And until service providers

know what their obligations are, they cannot even determine whether they should be seeking coverage under the Commission's "CALEA lite" concept.

Moreover, the Further NPRM turns the CALEA statutory scheme on its head. Under CALEA, the government was obliged to come forward with affirmative evidence to support the extension of CALEA under the Substantial Replacement Provision. Yet under the Further NPRM, the Commission appears to reverse the burden of persuasion, and making "exempted entities ... demonstrate that continued exemption is warranted." Further NPRM ¶ 58.¹ Simply put, CALEA should not apply to any entity, or any type of entity, until and unless the government has met its burden under the statute. It has not done so in the case of broadband service providers and interconnected VoIP providers, and it certainly has not done so for entities that, for example, operate research or other private networks.² The Commission cannot and should not reverse the burden established by the CALEA statute.

¹ In the First R&O, the Commission makes this reversal of the burden explicit. *See* First R&O ¶ 35 & note 98. In both places in the First R&O, the Commission says that "commenters have not provided sufficient evidence" to warrant an exemption. This is exactly the opposite of what the statute requires. The statute says that the government must come forward and establish that specific entities should be covered under the Substantial Replacement Provision. What the First R&O says, however, is that broad categories of entities are covered without any need for evidence that they are "substantial replacements," and then individual entities can "provide sufficient evidence" to argue that they should get an "exemption." The reversal of the burden in both the First R&O and the Further NPRM are directly contrary to the statutory language of CALEA, and the Commission lacks the authority to alter the burdens crafted by Congress in 1994.

² This distortion of the CALEA statute is vividly seen with "private networks," which are explicitly excluded from coverage in CALEA. Yet in the First R&O the Commission makes broad and vague pronouncements that suggest that private networks might indeed somehow be covered by CALEA, implying that such networks could apply for exemptions. Yet private networks are not covered by CALEA in the first place, and thus no exemption should be needed.

Respectfully submitted,

/s/

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